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No. 82-414

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN DEMJANJUK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether there exists a constitutional right to a jury trial in denaturalization actions under 8 U.S.C. 1451(a).

2. Whether petitioner was entitled to recovery of all costs of litigation because this is a "Nazi collaborator denaturalization case."

3. Whether the district court correctly admitted into evidence certain identification evidence, deposition testimony, and foreign documents.

4. Whether the district court abused its discretion in not granting a new trial because certain statements were not turned over to petitioner before trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is reported at 680 F.2d 32. The opinion of the district court (Pet. App. A4-A57) is reported at 518 F. Supp. 1362.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1982. The petition for a writ of certiorari was filed on September 7, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States filed this action in the United States District Court for the Northern District of Ohio, seeking revocation of petitioner's citizenship under 8 U.S.C. 1451(a) on the grounds that he had been the operator of the gas chamber at the Nazi death camp at Treblinka in 1942 and

1943 and had concealed that fact both when he applied for an immigration visa in 1952 and when he applied for naturalization in 1958. The gravamen of the complaint was that petitioner's actions had rendered him ineligible for immigration to the United States under the Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009, and that his naturalization therefore was procured both illegally, because he had never lawfully entered the United States, and by concealment of a material fact.

After a full trial on the merits, the district court revoked petitioner's citizenship (Pet. App. A4-A57). The court found that petitioner had served at Trawniki, the Nazi training camp for concentration camp guards (*id.* at A11-A18), that he had been an armed guard at Treblinka in 1942 and 1943 (*id.* at A19-A35), and that he had concealed these facts from immigration officials (*id.* at A39-A42) and again from naturalization examiners (*id.* at A42-A43). The court held that, under *Fedorenko* v. *United States*, 449 U.S. 490 (1981), petitioner's "failure to disclose his service under the German SS at Trawniki and his later service as an armed guard at Treblinka were material misrepresentations under § § 2(b) and 10" of the Displaced Persons Act, and that, given petitioner's ineligibility for a visa, "his citizenship must be revoked as 'illegally procured' because he failed to satisfy a statutory prerequisite of naturalization" (Pet. App. A46-A47; footnote omitted).[1] Alternatively, the court held that petitioner's naturalization must be revoked under 8 U.S.C. 1451(a) because it was procured by concealment or

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[1]The district court also held that petitioner was ineligible for a visa under Section 13 of the Displaced Persons Act, ch. 262, 64 Stat. 227, which rendered ineligible "any person who advocated or assisted in the persecution of any person because of race, religion, or national origin" (Pet. App. A47 n.43). In addition, the court held that petitioner "illegally procured his citizenship because he lacked the good moral character required" under 8 U.S.C. 1427(a) (Pet. App. A48 n.45).

misrepresentation of material facts (*id.* at A48-A50). The court denied petitioner's post-trial motion for a new trial based on the government's alleged failure to comply fully with certain pretrial discovery requests (*id.* at A51-A56).

The court of appeals affirmed (Pet. App. A1-A3). It concluded that "the District Court's findings of fact are not clearly erroneous under a 'clear and convincing' standard and the evidence [was] properly admitted" and that "[t]he District Court did not abuse its discretion in denying [petitioner's] motion for a new trial based on newly discovered evidence" (*id.* at A2).

ARGUMENT

As the district court recognized (Pet. App. A44-A45), this case is controlled by *Fedorenko* v. *United States*, 449 U.S. 490 (1981), which presented similar factual and legal issues. Petitioner does not suggest that the courts below erred in construing or applying *Fedorenko* nor does he dispute that the evidence, if properly admitted, satisfied the standard of "clear, unequivocal and convincing" evidence required of the government in denaturalization cases (*id.* at 505). Rather, petitioner claims that the district court erred in various procedural and evidentiary rulings. As demonstrated by the district court's extensive opinion (Pet. App. A4-A57), on which we primarily rely, these rulings were correct and do not warrant review by this Court.

1. Petitioner contends (Pet. 4-12) that he should have been granted a trial by jury in this denaturalization proceeding. We note at the outset that this issue was not properly raised in the court of appeals nor passed on by that court;[2] hence, it is not properly before this Court. See, e.g., *United*

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[2]Following oral argument in the court of appeals, petitioner sought leave to file a supplemental brief to raise for the first time an objection to his failure to receive a jury trial. The court denied leave to file the brief.

States v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927). In any event, the contention is without merit. We are aware of no case that has held that 8 U.S.C. 1451(a) requires a jury trial, and such a right cannot be derived from any of the constitutional provisions relied on by petitioner.

This Court has consistently recognized that "a denaturalization action is a suit in equity." *Fedorenko* v. *United States*, *supra*, 449 U.S. at 516; *Knauer* v. *United States*, 328 U.S. 654, 671 (1946). Accordingly, it is well established that the Seventh Amendment right of trial by jury does not apply. *Luria* v. *United States*, 231 U.S. 9, 27-28 (1913). Nor does petitioner have a right to jury trial under Article III or the Sixth Amendment, for a denaturalization suit is not a criminal prosecution. See, e.g., *Schneiderman* v. *United States*, 320 U.S. 118, 160 (1943).

Petitioner's reliance (Pet. 7-10) on *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963), is misplaced. There, the Court held unconstitutional a federal statute that provided for automatic "forefeiture of citizenship [as] a penalty for the act of leaving or staying outside the county to avoid the draft." The Court ruled that the penalty could not be imposed without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments. *Id.* at 165-167. Here, however, petitioner's denaturalization is not a criminal penalty, but rather the logical consequence of a finding that his citizenship was never properly obtained in the first place. Denaturalization in this context thus operates primarily to undo, rather than punish, an illegal act, and the Sixth Amendment provides no basis for finding a right to a jury trial. See *Johannessen* v. *United States*, 225 U.S. 227, 242 (1912).

Finally, the Fifth Amendment contains no derivative right to trial by jury in civil denaturalization cases. Petitioner's claim (Pet. 5-6) that such a right should be created under the test of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), is without merit. While petitioner's private interest in retaining his citizenship is admittedly substantial, there is no greater risk of an "erroneous deprivation" of that interest if the matter is tried by the court rather than a jury. As this Court has recognized, the substantial interest in retaining citizenship is adequately protected by imposing on the government a stringent burden of proving its case by clear, convincing and unequivocal evidence. *Fedorenko* v. *United States, supra*, 449 U.S. at 505.

2. Petitioner asserts (Pet. 13-16) that he was entitled to all costs of litigation because defendants in what he characterizes as "Nazi collaborator" suits should have a special entitlement to apparently unlimited expenses for investigation and trial. The court of appeals correctly concluded, however, that "nothing in the due process clause nor the facts of this case * * * require[s] a generalized award of fees and expenses to [petitioner's] counsel" (Pet. App. A3). Moreover, as the court of appeals noted (*ibid.*), petitioner "was never denied any specific request for necessary expenditures by the District Court," and, indeed, the district court conditioned the deposition of witnesses in West Germany on petitioner's counsel's ability to attend at government expense.

3.a. Petitioner contends (Pet. 16-18) that the district court erred in admitting videotaped depositions of two German citizens, Horn and Schaefer, and one American citizen, Segat. This contention is insubstantial. First, each of these witnesses was beyond the subpoena power of the court and thus exclusion of the deposition testimony would have meant that their testimony would be unavailable to the

court.[3] Second, defense counsel was present at the depositions and cross-examined the witnesses; indeed, as noted above, he attended the German depositions at government expense. Finally, petitioner does not suggest how he could have been prejudiced by admission of the testimony through deposition, rather than at trial. Petitioner himself was free to attend the depositions but chose not to do so; accordingly, he cannot now claim (see Pet. 17) that the witnesses did not "confront" him.

b. Petitioner argues (Pet. 29-30) that the photospreads shown to survivors of Treblinka for identification purposes were unduly suggestive. This fact-bound claim does not merit further review. The district court considered this issue carefully and explained its conclusions in detail (see Pet. App. A24-A25). The court correctly applied this Court's analysis in *Neil* v. *Biggers*, 409 U.S. 188, 199-200 (1972), and held that, although "the length of time between the events in question and the witness identifications is an extraordinary 34-35 years" (Pet. App. A31), the other factors enumerated in *Biggers*, including the certainty of identification (*id.* at A32), the "ample opportunity" to view petitioner at Treblinka (*id.* at A33), and the accuracy of the witnesses' prior descriptions (*id.* at A34), rendered the identifications reliable (*id.* at A35).[4]

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[3]This is surely true of the two German witnesses, who refused to travel to the United States. Segat was out of the United States during the trial and thus his testimony could have been secured only at considerable inconvenience to the court's scheduling.

[4]Petitioner points out (Pet. 29 n.24) that the photospread in this case was held to be unduly suggestive by the district court in *United States* v. *Fedorenko*, 455 F. Supp. 893 (S.D. Fla. 1978), rev'd on other grounds, 597 F. 2d 946 (5th Cir. 1979), aff'd, 449 U.S. 490 (1981). That conclusion, of course, was directed at the photograph of Fedorenko, not of petitioner. In any event, the government challenged on appeal in *Fedorenko* the district court's ruling on this issue, but the court of appeals, reversing on other grounds, did not reach the question, and it was not presented to this Court.

There is no merit to petitioner's related claim (Pet. 27-28) that the district court should have allowed his "expert" witness to testify with respect to this question. Judges are fully capable of deciding the reliability and admissibility of photospread identifications based on the testimony of the witnesses themselves and "an examination of all the factual circumstances" (Pet. App. A35). The court here acted well within its discretion in declining the advice of an "expert" on these matters.

Petitioner's claim (Pet. 22-27) that his attorney should have been present when the photospreads were shown to witnesses prior to trial is also without merit. The district court correctly held that decisions of this Court give no such right to defendants even in criminal cases (Pet. App. A29), and that, particularly in light of the "rigorous cross-examination of all six witnesses concerning the pretrial identification in this case" (*ibid.*), no exception to this rule was required here.[5]

c. Petitioner advances several arguments against the admissibility of the Trawniki ID card (Pet. 18-22). These points were considered in detail and rejected by the district court (Pet. App. A11-A18). The court found that the card was "authentic and clearly show[s] that [petitioner] was at the German SS training camp of Trawniki" (*id.* at A17; footnote omitted). The court noted that "at no time during the entire course of the trial was *any* evidence introduced to substantiate [the] speculations" of petitioner, renewed here, that the document was a forgery (*id.* at A12; emphasis in

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[5]Petitioner's contention (Pet. 24-25) that an exception is required because the government has a special office concerned with proceedings against Nazi war criminals is frivolous. By the same token, the fact that some identifications were overseen in Israel by Israeli investigators (Pet. 26-27) is irrelevant; regardless of what Israeli practice might be, such identifications must pass muster under American standards, and the district court held that they did (Pet. App. A35).

original). Petitioner claims (Pet. 21) that the Soviet government "did * * * not permit any testing upon the original [Trawniki ID card] to determine its date of origin," but the district court specifically noted (Pet. App. A17 n.13) that "the original card was made available to [petitioner] for the purpose of expert documents analysis [but] no such analysis was conducted."

Nor is there any substance to petitioner's claim that the document must somehow be deemed inherently untrustworthy because the Soviet Union, which made the card available from its World War II archives, is "our most severe critic" (Pet. 21) in international affairs. The document was offered and accepted under Rule 902(3) and (4) of the Federal Rules of Evidence (see Pet. App. A11), which provides detailed procedures for the admission of foreign public documents and certified copies of public records, and the district court gave detailed consideration to the question of its admissibility and reliability (*id.* at A11-A18). The fact that the document was supplied by the Soviet Union does not prevent its use in an American court. See *United States* v. *Linnas*, 527 F. Supp. 426, 433-434 (E.D. N.Y. 1981), aff'd, 685 F.2d 427 (2d Cir. 1982), cert. denied, No. 81-2336 (Oct. 4, 1982).

4. Petitioner's contention (Pet. 31-37) that the district court abused its discretion in failing to grant a new trial is without merit.

a. Petitioner first contends (Pet. 31-35) that the prosecution had an obligation to produce before trial an affidavit of Chaim Sztajer, a survivor of Treblinka now living in Australia, that was executed in September 1980. The district court correctly rejected this claim as "specious" (Pet. App. A56). In May 1980, the government provided petitioner with Sztajer's name and address in response to petitioner's

interrogatories requesting the names and addresses of persons who had failed to identify petitioner's photograph in a photospread. Petitioner did not request any statements of Sztajer or the other persons named by the government in response to the interrogatories, and indeed made no effort even to contact Sztajer or the other persons.[6] The district court correctly held that petitioner's "lack of diligence in pursuing information * * * should not be visited upon the Government" by requiring a new trial (*ibid.*).

b. Shortly before trial, the government received from the Soviet Union statements of five persons who had been present at Trawniki. Only one of these persons, Nikolai Dorofeev, recalled petitioner; Dorofeev also identified petitioner's photograph. The government inadvertently did not forward these statements to petitioner until after trial. The district court held that the government should have produced Dorofeev's statement upon receipt (Pet. App. A53), but that the failure to produce this statement (or the other statements) did not justify granting a new trial (*id.* at A51-A55). The claimed relevance of the statements, the court noted, was in establishing the authenticity of petitioner's identification card from Trawniki, and, in this respect, the statements "tend[ed] to corroborate" the government's case (*id.* at A54).

Petitioner contends (Pet. 35-37) that the court erred in refusing to grant a new trial because of the government's omission. He admits that the Soviet officials who took the statements did not even show a Trawniki ID card to the five persons (Pet. 36), but nonetheless claims that his knowledge of the existence of these witnesses would have shed light on the "fire of controversy" (*ibid.*) allegedly surrounding the card. But, as the district court pointed out, the authenticity

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[6]Sztajer was not a witness at trial.

of the card had "not been impugned by even a scintilla of evidence" at trial (Pet. App. A55). Moreover, the statements in question were "cumulative and not of such character that would probably produce a different result on a new trial" (*ibid.*; footnote omitted). Thus, the court of appeals correctly held (*id.* at A2-A3) that the district court did not abuse its discretion in denying petitioner's motion for a new trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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